VARNUM LLP
ATTORNEYS AT LAW

251 North Rose Street • Fourth Floor
Kalamazoo, Michigan 49007-3823
Telephone 269 / 382-2300 • Fax 269 / 382-2382 • www.varnumlaw.com

John W. Allen
BOARD CERTIFIED TRIAL ADVOCATE (NBTA)
AMERICAN BOARD OF TRIAL ADVOCATES (ABOTA)
ADMITTED IN MICHIGAN, FLORIDA, ILLINOIS, INDIANA, MINNESOTA AND WISCONSIN

Direct: 269 / 553-3501
Mobile: 269 /491-0056
jwallen@varnumlaw.com

November 1, 2011

Via E-Mail (MSC_Clerk@courts.mi.gov) & U.S. Mail
Mr. Corbin Davis, Clerk of the Court
Michigan Supreme Court
P.O. Box 30052
Lansing, Michigan 48909

Re: Adm. File No. 2002-24; Amendment to Rule 7.3 of the Michigan Rules of Professional Conduct.

Dear Clerk Davis:

I am a Michigan lawyer with Varnum Riddering Schmidt & Howlett LLP (Varnum Attorneys). In the past, I have served as Chair of the State Bar of Michigan Special Committee on Grievance, and have served as the Chair of the State Bar of Michigan (SBM) Standing Committee on Professional and Judicial Ethics (the "Ethics Committee").

I also served on the ABA Ethics 2000 Advisory Committee, and chaired the Ethics and Professionalism Committee of the ABA, Trial Tort and Insurance Practice Section. For several years, I have had the honor of serving as Chair and Moderator of the annual ICLE Ethics Panel and Seminar.

This letter contains the views of me only, not those of the Firm, ICLE, the State Bar of Michigan, the ABA, nor their Committees.

SUMMARY:

This proposed new regulation of lawyer advertising is infirm, and should be rejected. Too many of the "trigger" terms are vague and ambiguous, and the rule lacks the constitutionally required empirical evidence to sustain its validity. Moreover, sufficient authority already exists to regulate (and if appropriate, sanction) lawyer-disseminated information which is false, deceptive or misleading, and is not entitled to constitutional protection as commercial free speech.

1. Several terms in the proposed rule are vague and ambiguous, unfairly subjecting lawyers to quasi-criminal sanctions for conduct which is both well-accepted in present society and not harmful to anyone. A prime example is the trigger term "solicit,"

which is never completely defined in the Rule. Proposed Rule 7.3(b) tells lawyers some of the items which the term "solicit" **includes**, but never fully defines what "**other writing**" or "**other communication**" is actually included.

As with most Rules of Professional Conduct, the proposed Rule requires no *scienter* element. This is troublesome, since present day marketing often takes the form of conduct which has multiple motives.

In Michigan, MRPC is a strict liability, quasi-criminal disciplinary code; mitigating factors (past conforming conduct, no injury, lack of intent) affect only punishment, not culpability. See *In re Woll*, 387 Mich 154, 161, 194 NW2d 835 (1972).

While the vague words of the Proposed Rule might be intended to encourage "good practices," their use in the disciplinary Rules are likely to be a source of mischief. Vague and undefined terms could be used as a basis for *per se* disciplinary violations, despite the existence of strong mitigating evidence such as actual client consent, lack of intent, lack of damage, or strong empirical evidence that the alleged "misconduct" was preferable for the client.

Moreover, amendments to MRPC must also be considered in light of the reality that the MRPC are used in Michigan, as well as almost every other state, either directly or indirectly, as a platform for malpractice claims and other civil litigation such as fee disputes. *Cf., Beattie v. Firnschild*, 152 Mich App 785 (1986); *Lipton v. Boesky*, 110 Mich App 589 (1981) (rebuttable presumption of negligence); Restatement of the Law Third, *The Law Governing Lawyers*, §52. In the 21st century, Michigan lawyers are far more likely to encounter the MRPC in a civil, rather than disciplinary, context. For instance, the lack of the "Advertising Material" disclaimer could be used by a client as a basis for a misrepresentation claim to rescind an engagement agreement or support an otherwise meritless fee dispute.

In the most recent amendments to the ABA Model Rules of Professional Conduct, the newly-revised Scope, part [20] makes the concession that "since the Rules do establish standards of conduct by lawyers, a lawyer's violation of a Rule may be evidence of breach of the applicable standard of conduct." The *Restatement* takes a similar position. Restatement (Third) of the Law Governing Lawyers, § 52(2) & CMT.f (2000) (rule violation "may be considered by a trier of fact as an aid in understanding an applying" the duties of competence and diligence required to meet standard of care).

Even though the most recent amendments to the Michigan Rules of Professional Conduct have retained (in the Comment and "Preamble" to MRPC 1.0 (Scope and Applicability of Rules and Commentary) the admonition that the MRPC "are not designed to be a basis for civil liability," nevertheless the MRPC continue to define the "standard of care" for lawyers in civil lawyer professional liability cases. The changes proposed by Adm. File 2002-24 hold the real potential to increase civil claims, and also to create new ones which do not now exist.

In addition, there is legitimate concern that the changes that use vague terms will make it even more difficult to obtain summary disposition or summary judgment based on the lawyer's proven conformity with the Rules' requirements. The question of what is a "communication" will become a jury fact question, virtually eliminating summary disposition and summary judgment, and automatically vesting any such claim with some value. This is a radical, and unwarranted, change from current law. It should not be adopted in any of the MRPC.

Standard *business cards* frequently contain logo-types or other information (front and back) which are intended to inform the recipient of the lawyer's capabilities and skills, while at the same time persuading the recipient that this is the lawyer they should choose to engage for legal services. Marketing consultants frequently recommend uniform and shortened firm names, logo-types, color schemes, and other "marketing" techniques to be incorporated into business cards – for the purpose of and with the motive of capturing the recipients as clients of the lawyer or law firm. ***Is a lawyer business card an "other writing" within the meaning of Proposed Rule 7.3(b)(3)?*** At this point, no one knows.

Commonly used **lawyer stationery** raises the same questions, since it frequently uses logo-types, color schemes and other indicia of skills ("*Board Certified Civil Trial Advocate – National Board of Trial Advocacy*"), with a motive clearly intended to persuade the recipient of the lawyer's qualifications and desirability for engagement. ***Is lawyer stationery an "other writing" within the meaning of the Proposed Rule?***

Finally, "other communication" is, by negative inference from other parts of the subrule, clearly intended to include things **other than** writings. If oral or verbal communications are also to be regulated, the permissible content of them should be carefully defined by the Rule. Otherwise, the lawyer may be required to end every cocktail party conversation with a disclaimer "This is Advertising Material."

Although likely *reductio ad absurdum,* the above examples nevertheless illustrate the minefield which is created by attempting to define the universe of lawyer communications. In this day and age, and with the great multitude of lawyers available as competitors, there is virtually no communication nor any activity by a lawyer which does not have, at least in part, marketing or solicitation as a partial motive. As recognized by multiple U.S. Supreme Court decisions, this is not bad; it is good. It provides the vehicles by which lawyers supply information to the public about what legal services are available, and on what terms. Because our nation historically suffered a dearth of information about lawyer services (at least before *Bates v State Bar of Arizona,* 433 U.S. 350, 97 S.Ct. 2691, 53 L.Ed. 2d 810 (1977)), the earlier blanket prohibition against lawyer advertising actually operated to misinform the public by omission of information regarding legal services and the terms on which they might be delivered. We are past that. The explosion of both lawyers and new laws since 1977 makes necessary multiple vehicles for communication of that information to the public. No one is better suited to do so than lawyers. That is why their commercial speech is constitutionally protected, and should be encouraged.

Moreover, the motivation to solicit and advertise is ubiquitous in virtually all lawyer activities. To place unnecessary restrictions upon it might also affect participation in those activities, themselves, many of which have other, and indisputably legitimate motives. Participation in civic groups or donation of services and other materials to charitable causes could all be discouraged.[1]

2. The Proposed Rule, as written, likely fails to pass constitutional muster. The seminal case for lawyer advertising is *Bates v State Bar of Arizona*, *supra*, by which the U.S. Supreme Court ended a long-standing, virtually complete prohibition on lawyer advertising. The *Bates* case was about two lawyers in Arizona who operated a "moderate income" legal clinic, and placed advertising in the *Arizona Republic* to the effect that they "offered legal services at reasonable fees." The *Bates* lawyers argued that the Arizona Rule and disciplinary complaint against them regarding this ad violated First Amendment protections of free speech. The U.S. Supreme Court agreed, invalidating the Arizona Rule (and most every such rule in every other state) reinforcing the strong public policy supporting constitutional protection for commercial speech, including "marketing" and "solicitation" speech by lawyers. It rejected the rationale of the Arizona Bar that such advertising was "demeaning" or put the legal profession in some type of unfavorable public image. The Court also rejected the argument that lawyer advertising did not provide sufficient facts upon which a potential client could engage an attorney. At 433 U.S. 350, 375, the Court said:

> The argument assumes that the public is not sophisticated enough to realize the limitation of advertising, and that the public is better kept in ignorance than trusted with correct but incomplete information. We suspect the argument rests on an underestimation of the public. In any event, we view as dubious any justification that is based on the benefits of public ignorance.

The *Bates* Court also allowed for some regulation of lawyer advertising, but only that which is untruthful or misleading.

The U.S. Supreme Court later clarified some of the limits which could be placed on lawyer advertising in *Florida Bar v Went for It, Inc*., 515 U.S. 618 (1995). Here, the Court applied the "intermediate scrutiny" First Amendment tests on commercial free speech emanating from *Central Hudson Gas & Electric Corporation v Public Service Commission of New York*, 447 U.S. 557, 65 L.Ed. 2d 341, 100 S.Ct. 2343 (1980), using a four-part test, the first two parts concern whether the speech was lawful and not misleading. The Court then applied *Central Hudson* to determine whether the regulation was appropriate. The principal point challenged was the constitutionality of the Florida rule prohibiting lawyers from directly mailing to accident

[1] If a golf club or golf ball donated as a prize to a local charitable golf outing contains the name and logo-type of the lawyer or law firm with a partial intent of marketing and solicitation, does the proposed Rule also require the term "Advertising Material?"

or disaster victims within thirty days of the accidents or disasters. In that respect, the *Went for It* regulation is very close to the Michigan Proposed Rule 7.3(c)(2).

But the Michigan Rule seriously lacks what the Supreme Court found to be an essential part of the Florida regulation in *Went for It*. The Florida State Bar had conducted a very extensive and very expensive study, showing that many residents had negative impressions and opinions of unsolicited mailings of that type and that the public may have been misled or confused.[2] Relying very heavily on that Florida study, the Supreme Court concluded that Florida had demonstrated a substantial interest in the regulation, as well as that the regulation materially advanced that interest in a narrowly-drawn manner, thus, making the regulation constitutionally permissible under *Central Hudson*. *See Florida Bar*, 515 U.S. at 624.

The proposed Michigan Rule furnishes no such empirical evidence. Without that empirical evidence, it is extremely unlikely that the "thirty days after injury" prohibition would survive detailed constitutional review.[3]

Florida continues to be the most aggressive in attempting to regulate lawyer advertising, but also continues to be the regular loser when its newer, proposed rules are subjected to constitutional review. Florida's dubious distinction continues, even in the most recent federal court rulings invalidating multiple proposals to regulate lawyer advertising. *Harrell v Florida Bar*, M.D. Florida 3:08-cv-15, 9/30/2011, finding constitutionally invalid an attempt to prohibit certain phrases like "don't settle for less than you deserve," and to prohibit audio enhancements in advertisements. The Court criticized Florida for attempting to term these "manipulative" or confusing content, and for attempting to dictate or mandate content that advertisements should provide only "useful, factual information."

The central theme of all of these cases is that the public should not be "underestimated." For those rare cases which deserve attention, there are already adequate rules and sanctions for that lawyer advertising which is truly untruthful, misleading, and harmful.

3. Adequate rules already exist to sanction the advertising and solicitation which harms clients or the public. While not completely free of its own problems of ambiguity, the present MRPC 7.3 provides more than enough protection to the public, and adequate grounds to sanction those lawyers which engage in harmful misconduct. The Rule is

[2] The exact cost of this Florida study has never been specified, but has been estimated at $200,000. It was statistically sound, and likely would be admissible under *Davis - Frye* and *Daubert*.

[3] Additional considerations also weigh against the thirty day prohibition. For instance, the need for a claimant or class of claimants to preserve evidence can be materially obstructed or destroyed if an attorney-client relationship cannot be formed until more than one month after the critical event. This was not one of the considerations under Supreme Court review in *Florida Bar*, and therefore remains as an unknown element in the constitutional examination of such prohibitions.

guided by its explicitly stated intent to be within the limits of *Shapiro v Kentucky Bar Association*, 486 U.S. 466 (1988), and benefits from many years of construction and enforcement history. Together with MRPC 7.1 and 7.2, this part of the law is complete without any additions.

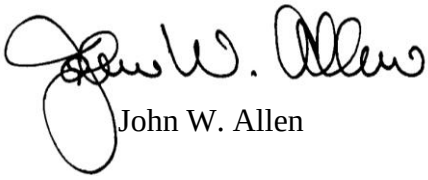
Many will agree that even some marketing or advertisements permissible under the Chapter 7 of MRPC nevertheless might subjectively be deemed to reflect poorly on what we personally prefer to be the public image of the legal profession; however, the Rules of Professional Conduct and more sanctions are not the remedies for the Bar's public relations issues. "Free speech" can be a tad messy, but the marketplace best sorts all this out, if left free to do that. The positive image of lawyers will be enhanced only by those lawyers who behave positively. Two hundred years of experience prove that is not something that can be mandated, even by the Michigan Supreme Court.

Virtually all lawyers in Michigan appreciate and share the same concerns and motives as the authors of the Proposed Rule. We just disagree that it is the right thing to do, at this time.

For all of these reasons, the Court should not adopt the Proposed Rule Amendments.

God Bless America,

VARNUM



John W. Allen

JWA/djb
4686329_1.DOC